

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED

APR 13 2004

Michael H. Milby, Clerk

BC

In re ENRON CORPORATION SECURITIES)
LITIGATION)

This Document Relates To:)

MARK NEWBY, *et al.*, individually and on)
behalf of all others similarly situated,)
Plaintiffs,)

vs.)

ENRON CORP., *et al.*)
Defendants.)

Civil Action No. H-01-3624
(Consolidated)

THE REGENTS OF THE UNIVERSITY OF)
CALIFORNIA, *et al.*, individually and on)
behalf of all others similarly situated,)
Plaintiffs,)

vs.)

KENNETH L. LAY, *et al.*)
Defendants.)

**LEHMAN BROTHERS HOLDINGS INC.'S AND
LEHMAN BROTHERS INC.'S PARTIALLY UNOPPOSED
MOTION TO RECONSIDER ORDER REGARDING
THE LEHMAN DEFENDANTS' MOTION TO DISMISS**

In light of the Court's March 31, 2004 Order regarding the CIBC Defendants' Motions to Dismiss, defendants Lehman Brothers Holdings Inc. ("LBHI") and Lehman Brothers Inc. ("LBI," and collectively with LBHI, the "Lehman Defendants"), respectfully request the Court to reconsider one aspect of its March 30, 2004 Order regarding the Lehman Defendants' Motion to Dismiss (the "Lehman Order"). In support of this Motion, the Lehman Defendants state as follows:

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1. In accordance with Local Court Rule 7.1, the Lehman Defendants conferred with plaintiffs about the present motion before filing it, and plaintiffs indicated that they do not oppose the motion as it relates to LBI but do oppose it to the extent it relates to LBHI.

2. As the Court recognized in the Lehman Order, plaintiffs named LBI as a defendant in this action for the first time in the First Amended Consolidated Complaint (the “Amended Complaint”). (Docket No. 2043 (Lehman Order) at 1.) The Amended Complaint purports to assert claims against LBI under Sections 11 and 12 of the Securities Act of 1933 for LBI’s participation as a underwriter or initial purchaser in certain Enron-related debt offerings.¹ One of the two offerings on which plaintiffs predicate their Section 11 claim against LBI is the May 19, 1999 offering of \$500M of 7.375% Enron notes. (*See* Am. Compl. ¶ 1006.)

3. LBI moved to dismiss the 1933 Act claims against it on the ground that they are time-barred. (*See* Docket No. 1526 (Lehman Mot. to Dismiss) at 7 n.5; *see also id.* at 5-6 n.3 (noting that the Section 11 claim based on the May 1999 offering is stale).)

4. Based on the finding that January 14, 2003, should be deemed the filing date of the Amended Complaint, the Court rejected LBI’s motion to dismiss the 1933 Act claims. (Docket No. 2043 at 4.)

5. However, even with a filing date of January 14, 2003, plaintiffs’ Section 11 claim relating to the May 19, 1999 offering of 7.375% Enron notes is time-barred under the three-year statute of repose set forth in Section 13 of the 1933 Act. (*See* Docket No. 2043 at 4 (three-year statute of repose governs 1933 Act claims).) For that claim to be timely, it would have had to

¹ On February 4, 2004, following Lead Plaintiff’s withdrawal of its opposition to dismissal, the Court dismissed the Section 10(b) and Section 20(a) claims against the Lehman Defendants. (*See* Docket No. 1969.) Thus, only the 1933 Act and Texas Securities Act claims remain pending against the Lehman Defendants.

have been filed on or before May 19, 2002. Plaintiffs thus filed their Section 11 claim against LBI approximately eight months too late. Accordingly, plaintiffs' Section 11 claim against LBI should be dismissed to the extent it is based on the May 19, 1999 offering of 7.375% Enron notes.

6. Indeed, the Court dismissed the very same claim against another of the underwriters in that offering, CIBC World Markets Corp., on the ground that the claim is time-barred. (Docket No. 2048 (Order Re CIBC Defendants' Motions to Dismiss) at 8-9.)² If plaintiffs' Section 11 claim based on the May 19, 1999 offering is time-barred as to CIBC World Markets, it must also be time-barred as to LBI.

7. Plaintiffs do not disagree. They do not oppose the dismissal of the Section 11 claim against LBI to the extent it is based on the May 19, 1999 offering.

8. Because there is no dispute that plaintiffs' Section 11 claim against LBI based on the May 19, 1999 offering of 7.375% Enron notes is time-barred, plaintiffs' claim for control person liability against LBHI under Section 15 of the 1933 Act also must fail. (See Docket No. 2048 at 9.) As it did with the Section 15 claim against defendant Canadian Imperial Bank of Commerce – because the Section 11 claim against its subsidiary, CIBC World Markets, is time-barred (see Docket No. 2048 at 9) – the Court should dismiss the Section 15 claim against LBHI to the extent it is based on the May 19, 1999 offering of 7.375% Enron notes.³

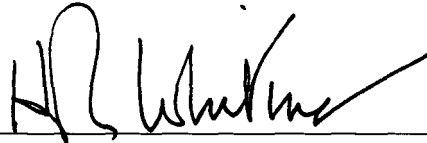
² Like LBI, CIBC World Markets was not sued until the Amended Complaint. (Docket No. 2048 at 2.)

³ See, e.g., *Fezzani v. Bear, Stearns & Co.*, No. 99 Civ. 0793 (RCC), 2004 U.S. Dist. LEXIS 5825, at *69 (S.D.N.Y. Apr. 6, 2004) (no control person claim where claim for primary violation is time-barred); *Lillard v. Stockton*, 267 F. Supp. 2d 1081, 1121-22 (N.D. Okla. 2003) (“Without pleading that Defendants violated federal securities laws within the limitations period, Plaintiffs have failed to demonstrate a primary violation of federal securities laws to impute control person liability to [Defendant].”); *Lasalle v. Medco Research, Inc.*, No. 93 C 5381, 1996 WL 252474, at *10 n.14 (N.D. Ill. May 10, 1996) (dismissing claim for control person liability because the claim for primary violation was time-barred).

WHEREFORE, for all of the foregoing reasons, the Lehman Defendants respectfully request that the Court reconsider its Order denying the Lehman Defendants' motion to dismiss and dismiss the Section 11 and Section 15 claims against the Lehman Defendants to the extent those claims are based on the May 19, 1999 offering of \$500M of 7.375% Enron notes.

Dated: April 13, 2004
Houston, Texas

Respectfully submitted,



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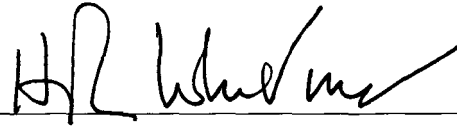
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served on the attorneys of record for all parties to the above cause through esl3624.com in accordance with the Court's order regarding website service on the 13th day of April, 2004.



CERTIFICATE OF CONFERENCE

I certify that I conferred with Helen Hodges, counsel for plaintiffs, on April 6, 2004 and April 8, 2004 and that we were able to agree about the disposition of one aspect of the Lehman Defendants' Motion for Reconsideration. Ms. Hodges indicated that plaintiffs do not oppose dismissal of the Section 11 claim against defendant Lehman Brothers Inc. to the extent it is based on the May 19, 1999 offering of \$500 million of 7.375% Enron notes. However, plaintiffs do oppose dismissal of the Section 15 claim against defendant Lehman Brothers Holdings Inc. based on the same offering.